UPREME COURT. U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 113

MANDASK COMPANIA DE VAPORES, S.A.,
Petitioner,

against

FEDERAZIONE ITALIANA DEI CONSORZI AGRARI, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1450

MANDASK COMPANIA DE VAPORES, S.A.,
Petitioner,

against

FEDERAZIONE ITALIANA DEI CONSORZI AGRARI, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents oppose the granting of a writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, dated January 16, 1968, on the ground that the decision in question was correct and does not involve any question warranting consideration by this Court.

Opinions Below

The statements under the above heading on page 2 of the petition for certiorari are inaccurate and incomplete. The Court of Appeals' opinion on the first appeal did not express the view that the petitioner should have been exonerated but reversed Judge Dawson's decision after the first trial and remanded for a new trial because the findings of fact were insufficient to explain possible inconsistencies between the portions of Judge Dawson's opinion relating to liability and those relating to limitation of liability.

The petition correctly states that the second appeal was heard by a different panel than the first and that that panel denied a petition for rehearing but neglects to point out that the petition for rehearing included a prayer for rehearing *en banc* and that the Chief Judge, Judge Lumbard, who sat on the panel which heard the first appeal, denied the application for rehearing *en banc*. His decision and order dated February 20, 1968, pointing out that no active circuit judge requested that a vote be taken on the suggestion, is annexed to this brief as Appendix A. This unmentioned ruling alone would largely nullify the argument on pages 19 and 20 and elsewhere in the petition that the decision of the panel which heard the first appeal conflicts with that of the panel which heard the second, if the opinions themselves did not dispel the notion. It seems apparent from a reading of the two decisions that there is no conflict and the fact that petitioner's request that an alleged conflict be resolved by the entire court *en banc* was not supported by any of the Judges who decided the first appeal indicates that they did not consider the decisions conflicting.

Questions Presented

The only question involved is the correctness of the decision below that the District Court properly found that the losses in suit were not due to fire or explosion but to unseaworthiness and that the defendant shipowner had not met its statutory burden of proof that the unseaworthiness was not caused or contributed to by its lack of due diligence (a requsite to exoneration pursuant to § 4(1) of the Carriage of Goods by Sea Act, quoted on pages 3 and 4 of the petition) or that it existed without defendant's privity or knowledge (a requsite to limitation of liability pursuant to the Fire Statute, 46 USC 183(a) quoted on page 3 of the petition).

Stripped of argumentative verbiage, the petition asks this Court to review the decisions below to determine whether as a matter of law the fact that after repairs a vessel was classified by the American Bureau of Shipping, a private organization, requires the District Court to find that the repairs constituted due diligence by the shipowner to make her seaworthy despite proof to the contrary. The District Court made findings of fact amply supported by the evidence that the *Perama* was unseaworthy in numerous respects discoverable in the exercise of due diligence which were or should have been known to defendant, and that the loss of cargo in suit was caused by unseaworthiness, not fire or explosion. Evidence was not available which would enable the Court to decide which of the *Perama's* unseaworthy conditions caused the loss, but it did properly decide that defendant had not proven that the cause was not one of the many proven unseaworthy conditions which were not latent and were competent to have caused the loss, and that in the absence of such proof the shipowner was liable without limitation pursuant to 46 USC § 183(a) for the loss of cargo carried pursuant to a contract subject to and incorporating the Carriage of Goods by Sea Act.

Respondents submit that it is so clear and well settled that, under such circumstances, classification by the American Bureau of Shipping does not constitute conclusive proof of the exercise of due diligence or lack of privity in or knowledge of proven unseaworthiness as to make it unnecessary for this Court to consider the question.

The statements in the petition to the effect that the Court of Appeals' decision is in conflict with prior decisions of the same Court or decisions in other circuits or the Courts in England are erroneous, as is the claim that there is any division on any question of law among the eight sitting judges who heard the trials and appeals of this suit respecting the standard of diligence to be applied.

Statement of the Case

The *Perama* was purchased by defendant in 1956, after she had been laid up in a badly wasted condition by American Oil Company, which had operated the vessel since she was built in 1936 (S.M. 1198-9).* Evidence was adduced at the trial and retrial to show that the repairs and renewals made by defendant under the supervision of the American Bureau of Shipping to put the vessel back in class left her crack prone and unseaworthy in the following respects:

First, a large number of the vessel's plates which were wasted in excess of 25% of their thickness and should have been replaced were not renewed (S.M. 1320-1329).

Second, many internal structural components were excessively wasted and were not renewed, creating danger of cracks which could propagate into the hull plating (S.M. 1325-1329).

Third, the defendant elected not to replace the plates it did renew by riveting but by welding. Plaintiffs' experts showed that this method of repair to a riveted ship creates islands of welded plating in the riveted hull, discontinuities in stress distribution and stiff spots likely to result in cracks. It incorporates old plating in such areas which may crack when notched and stressed by welding. Experts testified that the repair method can be employed safely in a riveted ship, if at all, only to a limited extent and if thorough precautions are taken to avoid conditions which in any way accentuate the enhanced danger of crack development. They considered the welded inserts too extensive (S.M. 1008-1113, 1330-1331).

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* References are to pages of the Stenographer's Minutes for the second trial.

The evidence shows that adequate precautions against cracks resulting from the repair method adopted were not taken. There were excessive discrepancies in thickness between new plates and those to which they were welded and none of the old plating was tested to determine whether it was notch sensitive when welded (S.M. 1247, 1330, 1333-1336).

Fourth, the repair method utilized involved the cropping of the old plates to which the renewal plates were to be welded to eliminate rivet holes. This created discontinuities at the ends of strakes of renewal plates and at the juncture of individual renewed plates and old plating to which it was welded, which constituted stress concentrators and potential crack triggers. The adoption of such a repair method required the taking of special complicated precautions against the development of cracks at the ends of strakes as the result of the discontinuities. An indication that such extra precautions were not taken is that cracks can be seen at the ends of renewal plates welded into the deck in photographs taken the morning after the cracks responsible for the *Perama's* loss occurred (S.M. 1408-1410).

Fifth, the defendant elected to repair thousands of loose rivetheads by welding on new heads rather than replacing the rivets. This method is inherently dangerous because of the probability that a crack trigger will result if any of the welding unites the ship's plating with the new rivet head. This almost always occurs when any large number of such repairs is made (S.M. 1331-1332).

Testimony further showed that after completion of the reactivation repairs the *Perama* became unseaworthy in the following additional respects prior to the commencement of the voyage on which she sank:

Sixth, the *Perama's* engine room piping was improperly and inadequately repaired at New Orleans immediately prior to the voyage in suit in a way which may have re-

sulted in its breaking and contributing to the flooding of the vessel's engine room (S.M. 1340-1345).

Seventh, the *Perama* sailed upon the voyage in suit with a shockingly inadequate complement of licensed engineering and deck officers whose incompetence hampered damage control and salvage (S.M. 774-792, 3113, 4118).

The opinions of the trial court and the Court of Appeals show that both courts accepted the evidence of the *Perama's* lack of seaworthiness and her owner's lack of diligence in the respects listed (Petitioner's Appendix A-20-38, A40-49).

The vessel, after loading the cargo in suit, proceeded from Baton Rouge toward Genoa until her engines broke down in the Caribbean. While she was awaiting the arrival of tugs to get her back to port for repairs a fire developed in the pump room and cofferdam after what may have been a bulkhead crack. The fire was extinguished in an hour and ten minutes. Hours later a sound was heard which all courts passing on this case have held was a bottom plating crack and not an explosion. Water started rushing into the vessel in the engine room and cofferdam area and the vessel settled in a manner establishing conclusively that she was also taking water forward. The weather was good, the sea calm. Over twelve hours later she finally sank while salvage efforts were in progress (Petitioner's Appendix, A26-27).

On these facts the District Court and the Court of Appeals properly held that the vessel sank as a result of unseaworthiness; that the owner had not shown as required by Sec. 4(1) of the Carriage of Goods by Sea Act, 46 U.S.C. 1304 (1) that the unseaworthiness did not result from its many failures to exercise due diligence; and that the shipowner had not shown that the loss did not result from causes within the privity or knowledge of the shipowner so as to entitle the owner to limitation under 46 U.S.C. 183(a) (Petitioner's App. A-46-A-49).

There Are No Reasons for Granting the Writ

1. The Court of Appeals' decision is not in conflict with its own prior decisions or those of other circuits or of the English courts.

The petition asserts that proof of the approval of the American Bureau of Shipping of repairs made in a reputable yard before the *Perama* was reactivated entitled petitioner, as a matter of law, to a finding that it exercised due diligence respecting the repairs and was not privy to any of the unseaworthiness traceable thereto. That is not the law and the cases cited in the petition do not so hold. A shipowner may not delegate his duties relating to seaworthiness to any person or organization. The American Bureau of Shipping is a private agency. Its action cannot set standards. Its approval or disapproval of the proposed repairs is based largely upon the findings of individual surveyors (in this case a Mr. Curren) as to their suitability for a particular vessel in the light of its condition. The delicts of that surveyor or anyone else selected by owner to fulfil its duty to exercise diligence operate to preclude owner from utilizing the defense to liability for cargo loss traceable to unseaworthiness set forth in Section 4 of the Carriage of Goods by Sea Act. Moreover, if the management of the shipowner knows or should know of the unseaworthiness it cannot limit liability merely because the Classification Society did not prevent or rectify it.

Petitioner complains in part that it should not have been held liable because too many and too large inserts of welded renewal plating and internals were installed in a riveted ship because the American Bureau of Shipping permitted them even though there is testimony that the Coast Guard would not had the *Perama* flown the U.S. flag. The extent to which it would be proper to utilize welding in repairing a riveted ship depends not only on maximum standards but turns in considerable measure upon the condition of the plating and internals which are not to be

replaced. If these are new and unwasted, larger inserts of welded replacement parts may be safely utilized without causing discontinuities or other dangerous conditions. The American Bureau of Shipping Surveyor, Curren, simply did not investigate areas of plating and internals which previous drillings indicated to be excessively wasted because he was not furnished and did not know about the previous drillings on file with the American Bureau of Shipping and neither he nor the owner's surveyor troubled to find out about them. That lack of diligence alone was sufficient to deny exonoration whatever the maximum limitation on welding in a riveted ship might be.

Contrary to the statements made in the petition there is nothing novel in imposing liability on a shipowner for unseaworthy repairs approved by a classification society or competent surveyors. It has frequently been held that a shipowner cannot escape liability for losses due to discoverable unseaworthiness by attempting to delegate its duties respecting diligence. Some of the cases so holding are:

The Otho (C.C.A.2, 1944), 139 F.2d 748, *cert. den.* (1944) 322 U.S. 735;

General Motors Corp. v. *The Olancho* (S.D.N.Y. 1953), 115 F. Supp. 107, *aff'd* (C.A.2, 1955) 220 F.2d 278;

The Abbazia (S.D.N.Y., 1904), 127 Fed. 495;

Compagnie Maritime Francaise v. *Meyer* (C.C.A. 9, 1918), 248 Fed. 881;

Bank Line v. *Porter* (C.C.A. 4, 1928), 25 F.2d 843, 845; *cert. den.* (1928) 278 U.S. 623;

The Southwark (1903), 191 U.S. 1;

International Nav. Co. v. *Farr & Bailey Mfg. Co.*, (1901) 181 U.S. 218;

The James Griffiths (C.C.A. 9, 1936), 84 F.2d 785; *cert. den.* (1937) 299 U.S. 612;

Sabine Towing Co. v. *Brennan* (C.C.A. 5, 1934), 72 F.2d 490, *cert. den.* (1934) 293 U.S. 611;

Ionian SS Co. of Athens v. *United Distillers* (C.A. 5, 1956), 236 F.2d 78, 83;
Southwestern Sugar & Molasses Co. v. Artemis Maritime Co., (E.D.Va. 1950), 92 F.Supp. 631; *aff'd* (C.A.4, 1951) 189 F.2d 488;
Schade v. *National Surety Corp.*, (C.A. 2, 1961) 288 F.2d 106;
The Windsor Victory (E.D.La. 1968), 278 F.Supp. 648.

The cases relied upon in the petition for the proposition that the owner need only engage competent surveyors and repairers are cases in which the trial court found affirmatively that there was no failure on anyone's part to exercise due diligence respecting seaworthiness and stressed that the proper and customary inspections and work performed by competent organizations constituted some evidence that due diligence had been exercised. Here the trial court has found on ample evidence that unseaworthiness known to or which should have been discovered by the shipowners' management before the vessel sailed caused cargo loss to which the Carriage of Goods by Sea Act is applicable.

There is no conflict between authorities under the Hague Rules and the Brussels Convention of 1924, implemented here by the Carriage of Goods by Sea Act, as to the proposition that if there is a failure to rectify discoverable unseaworthiness prior to the commencement of a voyage having causal relation to a cargo loss, a shipowner is liable for the loss regardless of who is responsible for failing to exercise the requisite diligence. The English law to this effect is set forth in *Riverstone Meat Co.* v. *Lancashire Shipping Co., Ltd.* (*The Muncaster Castle*) (1961) A.C. 807, 1961 A.M.C. 1357. That case is not in conflict with *Union of India* v. *N. V. Reederij Amsterdam*, (1963) 2 Lloyd's List Law Reports 223, as implied in the petition. The latter case is merely another holding that inspection and repair by competent men is some evidence of the

latency of unseaworthiness that subsequently manifests itself and hence that it was not discoverable in the exercise of diligence, and is not a holding that selection of competent surveyors or repairers fulfills a shipowner's duties respecting diligence to make the ship seaworthy.

The difference in result between *Peter Paul, Inc.* v. *Rederi A/B Pulp* (*The Christer Salen*), (C.A.2, 1958) 258 F.2d 901 and *States SS Co.* v. *United States* (C.A.9, 1958), 259 F.2d 458, stems from a difference in findings of fact as to the state of knowledge of the safeguards needed against brittle cracking of plating at the relevant times. Such knowledge is always a factor in determining what constitutes diligence. *The Esso Providence* (S.D. N.Y., 1953) 112 F. Supp. 630. The evidence clearly establishes that when this case arose the dangers of brittle fracture and the need to avoid the conditions built into the PERAMA were widely known. No one, including the American Bureau of Shipping, can authorize a shipowner to subject cargo to such known dangers under the Hague Rules and Brussels Convention embodied in the Carriage of Goods by Sea Act.

2. There is no division on any issue of law among the Judges passing upon the *Perama* trials and appeals.

There is no conflict on any question of law involved in the prior decisions in this case. They turned on findings of fact and their sufficiency. We have already pointed out above in this brief (page 2) that the judges who sat on the first appeal did not elect to re-hear the appeal *en banc* after the second decision, although requested to do so. Apparently they did not see any conflict between the first and the second decisions.

3. The defendant shipowner was held liable for failure to exercise diligence respecting seaworthiness and not violation of any Coast Guard regulation.

Coast Guard inspection practices were discussed only as having a bearing on repair practices in the United States and no Coast Guard regulation was treated as applicable to the *Perama* repairs, *per se*.

4. One of petitioner's many derelictions in the exercise of diligence was properly found to be its failure to test the *Perama's* plating for notch sensitivity.

The material purporting to be the fourth reason for granting the petition, on pages 21-24 misstates the testimony and the findings. The Court accepted testimony by Ganly, MacCutcheon and other experts that the *Perama* was subjected to no force that would cause her to crack if she did not contain brittle notch-sensitive plating and internals. The petition does not seek a review of the clear and well supported findings that there were no explosions to account for the crack-up, nor stresses due to loading or weather conditions that could account for it unless she was brittle. The contention in the petition that the trial court's decision that the *Perama* contained steel which was brittle if notched is unsupported by the evidence and is untrue.

The claim made in the petition that the courts below were not justified in treating the failure to test for notch sensitivity before welding as a lack of diligence is equally baseless. The evidence showed that a test known as the Charpy test would determine conclusively whether the *Perama's* old plating would be notch sensitive and hence brittle when welded, and that the test was well-known, relatively inexpensive and could have been conducted conveniently by using coupons which had to be cut from plating to be welded to replacement plates to eliminate rivet holes.

The evidence that no one could be sure whether or not the *Perama's* plating would be brittle when welded to new plates without subjecting it to a Charpy test was undisputed. The decision to weld long strakes of new plating to old plating under such circumstances without testing the old for notch sensitivity was patently dangerous and a violation of any proper standard of diligence. It is not excused by the fact that the American Bureau of Shipping did not force the owner to test as a condition precedent to approval of the repair.

5. The decision the petition asks this Court to review does not change the existing law.

The basic argument of the petition is that the District Court and the Court of Appeals erred as a matter of law in holding that insertion of relatively large areas of welded replacement plating and internal structures in a previously all-riveted ship without testing the old plating and internals for notch sensitivity constituted part of petitioner's derelictions in diligence because the American Bureau of Shipping permitted them. The propriety of such repair methods often turns on the condition of particular vessels and the feasibility of testing. These questions can be decided only by individual inspectors in the light of their own investigation, which may or may not be diligent. No court has ever held that the American Bureau of Shipping is the final arbiter of diligence. None of the cases relied on in the petition so hold. They do not authorize the adoption of dangerous repair methods or the omission by shipowners of reasonable safeguards against known dangers merely because the ABS has not withheld classifications.

The decision of the case at bar does not change shipowner's liabilities. The owner's liability for cargo losses traceable to unseaworthiness continues to be limited to those cases where a lack of diligence is responsible for the unseaworthiness as before, and the Courts, not the ABS, continue to be the arbiters of what constitutes lack of

diligence. Any difference in the result reached in the case at bar and that reached in earlier cases cited in the petition are due to changes in the knowledge of the shipping world respecting safeguards against hull cracks and not any difference in the legal standards applied. There is no need for this Court to review the decision below to settle or clarify the law.

Respectfully submitted,

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June 3, 1968.

APPENDIX A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

FEDERAZIONE ITALIANA DEI CONSORZI AGRARI, et al.,
Plaintiffs-Appellants,

v.

MANDASK COMPANIA DE VAPORES, S.A.,
Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Mandask Compania de Vapores, S.A., and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

February 20, 1968.